

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Inquiry Concerning Deployment of Advanced)	
Telecommunications Capability to All)	GN Docket 17-199
Americans in a Reasonable and Timely Fashion)	

To The Commission

**COMMENTS OF THE MULTICULTURAL MEDIA, TELECOM AND
INTERNET COUNCIL ON THE SECTION 706 REPORT NOTICE OF INQUIRY**

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Summary

The Multicultural Media, Telecom, and Internet Council (“MMTC”) respectfully submits these Comments in response to the Section 706 Notice of Inquiry (“NOI”).¹ Specifically, MMTC will address the issues raised in the sections set forth below.

1. Due to the unique assets of both fixed and mobile services, these services are complements to each other as well as substitutes for the other in some instances. Therefore, the Commission should evaluate mobile services both jointly and separately from fixed services. *See* §I, pp. 3-5 *infra*.
2. MMTC believes the Commission should use Section 706 of the Telecommunications Act to ban digital redlining. The FCC should adopt an impact standard, rather than an intent standard, to determine whether a company is engaged in redlining. *See* §II, pp. 5-8 *infra*.
3. In looking at the deployment of advanced telecommunications in school systems, it is important to ensure that school facilities are built up equally. Deployment that complies with school desegregation mandates ensures all students will have access to this critical tool and prevent the growth of a divide in technological skill sets among students. *See* §III, pp. 9-10 *infra*.
4. MMTC believes the GO Act is a strong first step on Chairman Pai’s path to closing the digital divide. We believe the following changes can improve its impact: (1) encourage the deployment of new technologies; (2) allow small businesses, rather than just the carriers, to be classified as “eligible tax payers,” (3) encourage the

¹ *Thirteenth Section 706 Report Notice of Inquiry*, Public Notice, GN Docket No. 17-199, FCC 17-109 (“NOI”) (released August 8, 2017).

collection of data by the FCC and NTIA to facilitate cost-benefit analysis; and (4) require outreach broad enough to reach qualified minority and women-owned business enterprises, disabled and veteran owned firms. *See* §IV, pp. 10-13 *infra*.

I. Mobile Services Should Be Included In The Commission's Evaluation Of Advanced Telecommunications Capability

Mobile telecommunications is both a unique service while also a complement to fixed telecommunications. Therefore, it should be evaluated both separately and jointly with fixed internet services.

As the Commission points out, there has been a 30% increase in smartphone usage since 2012 and most of the United States lives in an area with LTE coverage by at least one service provider.² The increased use of mobile service as a close substitute for fixed service aligns with the goal of Section 706 of the Telecommunications Act to encourage the deployment of advanced communications in a manner that satisfies public interest, convenience, and necessity.³

The reason mobile and fixed services are complements instead of full substitutes is because each provides unique assets. Commissioner Clyburn aptly highlights key differences between the two services including “how they operate” and “how they are marketed to consumers, including both from the perspective of speed and data usage.”⁴ For example, entrepreneurs who operate start-up companies from their homes need the speed of fixed internet. In addition, students use fixed services as a more efficient method to conduct research and complete school work. Finally, fixed internet is the most user-friendly methodology to search for employment.

For its part, mobile service provides unique traits and possesses the potential for positive social impacts that cannot be matched by fixed service. An example of this is MMTC's Santana

² NOI at 3 ¶6.

³ Codified at 47 U.S.C. §1302.

⁴ NOI at 20 ¶4.

Initiative.⁵ The Santana Initiative's purpose is to train members of twelve national organizations as well as citizens on how to lawfully record police actions and other potential civil rights violations.⁶ In 2015, people of color were killed at twice the rate of White people by police officers.⁷ Mobile phones and the constitutional right to record officers⁸ increase the possibility of achieving justice for the victims while also deterring unlawful actions by officers. The use of mobile video demonstrates how "technological constraints on electronic communication are now becoming less confining."⁹ Wireless can be a driving force of good, to serve as "expanders of human culture."¹⁰

In fact, people of color have been the leading adopters of wireless technology; MMTC has dubbed this the "minority wireless miracle."¹¹ In 2016, 23% of Hispanics and 15% of

⁵Feidin Santana inspired the initiative when he recorded the shooting of Walter Scott by a police officer in N. Charleston, S.C with his mobile phone. *See How to Responsibly Record Mobile Video of Civil Rights Violations: FAQs from the Multicultural Media, Telecom & Internet Council*, available at www.mmtconline.org by clicking on "Law and Policy Documents" and it is the second link from the top (last visited August 22, 2017).

⁶ *Id.*

⁷ Jon Swaine, Oliver Laughland *et al.*, "Young Black Men Killed by U.S. Police at Highest Rate in Year of 1,134 Deaths," *The Guardian*, December 31, 2015, available at <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-youngblack-men> (last visited June 22, 2017).

⁸ An individual may record on-duty police officers who are conducting official activities in public or in private where individuals have the right to be. *See Santana-Initiative-FAQs*, available at www.mmtconline.org under "Law and Policy Documents" (last visited August 22, 2017).

⁹ Ithiel de Sola Pool, *Technologies of Freedom* 26 (1983).

¹⁰ *Id.* at 226.

¹¹ MMTC coined this term to describe "the relative affordability of mobile wireless broadband use versus costs for home broadband use." *See* David Honig, *How to Alleviate the Spectrum*

African Americans, but only 9% of Whites relied solely on their mobile devices for internet services.¹²

Mobile internet is its own unique service that many individuals rely on for internet access. However, it serves both as a complement and as a substitute for fixed internet services. Therefore, the FCC should evaluate mobile both jointly and separately from fixed services.

II. Digital Redlining Of Fixed Services Threatens To Create A Two-Class Society Unless The FCC Promptly Intervenes

Every American deserves equal access to broadband, as it has become an essential tool in modern society. It allows people to acquire new skills, secure employment, secure urgent and affordable health care, further their education, and participate in civic dialogue. Digital Redlining profoundly threatens all this by inhibiting those living in low-income areas, and particularly minorities by virtue of the history of segregation and the persistence of disparities based on wealth,¹³ from attaining the benefits of digital citizenship. As Chairman Pai has recognized, digital redlining “fenc[es] off lower-income neighborhoods on the map and [says] ‘It’s not worth our time and money to deploy there.’”¹⁴

Shortage, Address delivered at the World Conference of Mayors, Tuskegee, AL, May 18, 2012 (available from undersigned counsel).

¹² See *Mobile Fact Sheet*, Pew Research Center (January 12, 2017), available at <http://www.pewinternet.org/fact-sheet/mobile/> (last visited August 22, 2017).

¹³ See *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, Pew Research Center (June 27, 2016), available at <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/#a-growing-wealth-gap-between-blacks-and-whites> (documenting fact that wealth of White households is 13 times that of Black households) (last visited August 29, 2017).

¹⁴ See Ajit Pai, Chairman, FCC, *Remarks at the Newseum: The Future of Internet Freedom* (Apr. 26, 2017), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0426/DOC-344590A1.pdf (last visited August 14, 2017).

When Chairman Pai established the Advisory Committee on Diversity and Digital Empowerment, he asserted that digital redlining posed a serious problem and made this topic a first priority for the Committee.¹⁵ We agree with Chairman Pai and commend the steps he is taking to eliminate digital redlining from the telecommunications industry.

We believe the next step is to use Section 706 of the 1996 Telecommunications Act¹⁶ to ban digital redlining. In theory, on its face, Title II of the 1934 Communications Act should preclude redlining, but redlining can still happen even under Title II regulation. For example, the 1977-1983 custom calling transition typically occurred first in wealthy suburban towns and concluded in inner cities, even though all consumers had to pay monthly fees throughout the transition period to pay for enhanced services that others received.¹⁷

Section 706 encourages deployment in a manner that satisfies public interest.¹⁸ What

¹⁵ FCC, News Release, Chairman Pai Announces Intent to Establish Advisory Committee on Diversity and Digital Empowerment (Apr. 24, 2017) (“Every American should have the opportunity to participate in the communications marketplace, no matter their race, gender, religion, ethnicity, or sexual orientation. In order to help the FCC advance that goal, I am pleased to announce that I intend to establish the Advisory Committee on Diversity and Digital Empowerment. This Committee will be charged with providing recommendations to the FCC on empowering all Americans. For example, the Committee could help the FCC promote diversity in the communications industry by assisting in the establishment of an incubator program and could identify ways to combat digital redlining”), available at <https://www.fcc.gov/document/chairman-pai-announces-plan-form-advisory-committee-diversity> (last visited September 3, 2017).

¹⁶ Codified at 47 U.S.C. § 1302.

¹⁷ For example, in the Washington, DC market, Columbia and Reston were the first to receive call forwarding, call waiting, three-way calling, and voicemail services. After eight years, Anacostia finally received these services. However, because all customers had to pay \$1.00 per month to pay for the buildout, Anacostia residents paid \$96 to subsidize services that others received but they did not for eight years.

¹⁸ The Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary

aggrieves consumers is the absence of service irrespective of the provider's intent. Because of this, the FCC should adopt an impact standard to determine whether a company engaged in digital redlining.

Historically, the disparate impact theory has often been used in employment discrimination cases.¹⁹ The Supreme Court's 2015 holding in *Texas Department of Housing and Community Affairs*²⁰ that disparate impact claims are also cognizable under the Fair Housing Act (FHA) may be a basis for extending this theory's application to telecommunications redlining.

In this case, the Inclusive Communities Project Inc. (IPC) alleged that the practices of the Department of Housing and Community Affairs caused segregating housing patterns.²¹ IPC alleged this was done by providing too many low-income housing tax credits in predominantly Black communities and too few credits in predominantly White communities.²² In ruling that disparate impact theory was cognizable under the Fair Housing Act,²³ the Court imported

and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a).

¹⁹ “[P]rocedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

²⁰ *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2510 (2015).

²¹ *Id.* at 2510.

²² The Department approved 49.7% of tax credits in 0-9.9% Black areas, and approved 34.7% of credits in 90-100% White areas; 92.29% of tax credit units were in areas with less than 50% White residents. *Id.* at 2514.

²³ *Id.* at 2510.

employment discrimination jurisprudence²⁴ and compared it to the purpose of the FHA.²⁵

Although the case was decided in favor of the defendant, it illustrates the plaintiff's robust causation burden in order to successfully bring a disparate impact claim where discriminatory intent is not a requirement.²⁶

The FCC can follow the wisdom of courts and use Section 706 of the Telecommunications Act to prevent the impact of discrimination similar to the manner in which the Court interpreted the FHA in *Texas Dept. of Housing and Community Affairs*. Section 706 and the Fair Housing Act each protect the interests of consumers in their own ways. Section 706 covers deployment of broadband to "all Americans."²⁷ Section 706 qualifies as an antidiscrimination law because it prevents unequal access to broadband just as the Fair Housing Act prevents unequal access to housing. Allowing some members of the community access to broadband while denying access to others would be the same as permitting only certain members of a community to have access to desirable housing. The FCC should determine the discriminatory nature of an action based on its impact on consumers to prevent digital segregation.

²⁴ *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

²⁵ "[A]ntidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose" *Id.* at 2511.

²⁶ "In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." *Id.* at 2513.

²⁷ 47 U.S.C. §1302(a).

III. Deployment of Advanced Telecommunications In Schools And Classrooms Should Be Accomplished In A Manner That Complies With School Desegregation Mandates

In looking at the deployment of advanced telecommunications in school systems, it is important to ensure that school facilities are built up equally consistent with the mandate of *Green v. County School Bd. of New Kent County VA*²⁸ in school desegregation law. *Green* stems from the decision in *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.* (“*Brown I*”), which held that segregation in schools deprived individuals of equal protection under the 14th Amendment.²⁹ The Court modified this ruling the following year in *Brown v. Board of Educ. of Topeka, Kan.* (“*Brown II*”), when it ruled that compliance with *Brown I* must be done with “all deliberate speed”.³⁰ By 1968, 13 years after *Brown II*, it had become clear that throughout the south “all deliberate speed” had meant “no speed.”

Therefore, in *Green*, the Court required school districts to “effectuate a transition into a nonracially discriminatory school system.”³¹ The Court identified six factors of a school system’s operation to determine whether the school system had eliminated *de jure* segregation and its present effects and thus had attained “unitary status.”³² These “*Green* factors” reflect a national policy to end segregation in school systems.

One of these six *Green* factors is equal facilities.³³ Access to broadband is perhaps the

²⁸ *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430 (1968).

²⁹ *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 495 (1954).

³⁰ *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955).

³¹ *Green*, 391 U.S. at 435.

³² *Id.* The six *Green* factors are facilities, staff, faculty, student body composition, transportation, and extracurricular activities.

³³ *Green*, 391 U.S. at 435.

most important element of equal facilities in school desegregation jurisprudence today.

Providing broadband in some schools while denying it to others offends the equal facilities mandate of *Green*. Therefore, the FCC must ensure equal deployment to all schools and thereby do its part to eliminate a key vestige of school segregation.

Deployment that complies with school desegregation mandates ensures that all students will have access to this critical tool and prevent the continued growth of a divide in technological skill sets among students.

IV. The Commission Should Incentivize Small And Minority Businesses To Help Serve Underserved Communities

The Commission has sought input on how best to incentivize companies to participate in broadband deployment.³⁴

Chairman Pai demonstrated his support for closing the digital divide through his endorsement of the Gigabit Opportunity Act (GO Act).³⁵ He believes the GO Act to be one of the best ways to ensure that communities are “open for jobs, opportunities, and economic growth.”³⁶

MMTC agrees that the GO Act could be a strong first step toward closing the digital divide. We also believe it could be an effective tool to spur job growth. To maximize the potential of the GO Act, it is important to understand how the GO Act is structured in its current form, and what changes could improve its impact.

³⁴NOI at 15 ¶48.

³⁵ See Chairman Ajit Pai, *Statement of FCC Chairman Ajit Pai on the Introduction of the Gigabit Opportunity Act: An Important Step Toward Closing the Digital Divide* (May 3, 2017), available at <https://www.fcc.gov/document/statement-chairman-pai-gigabit-opportunity-act> (last visited September 3, 2017).

³⁶ See Commissioner Ajit Pai, *A Digital Empowerment Agenda*, 4 ¶4 (September 13, 2016), available at <https://www.fcc.gov/document/commissioner-pais-digital-empowerment-agenda> (last visited August 25, 2017).

The Gigabit Opportunity Act would expand broadband deployment by:

- Targeting investments to areas poised for growth: The GO Act directs investments to low-income and rural communities with the greatest potential for economic development by providing tax deferral and immediate expensing for companies investing in gigabit-capable broadband expansion.³⁷
- Streamlining patchwork regulations: The GO Act directs the FCC to release a framework that encourages states, counties, and cities to voluntarily adopt streamlined broadband laws and be designated as a “Gigabit Opportunity Zone.”³⁸
- Eliminating barriers to investment: The GO Act temporarily defers capital gains for broadband investments and upgrades, and allows companies to immediately expense the cost of gigabit-capable equipment in “Gigabit Opportunity Zones.” The GO Act also allows states to issue tax-exempt bonds without a low-income geographic requirement.³⁹

Chairman Pai’s goal of “empowering every American community to take control of its own destiny in this digital age”⁴⁰ is best accomplished with the following modifications to the GO Act:

- The FCC should encourage the deployment of new technologies. Many of the technologies eligible for GO Act support are heritage technologies originally deployed at a time when there was little regulatory attention to redlining. Available GO Act investments for these older technologies could incentivize companies to cancel routine construction and upgrades to equipment. As a result, companies would conduct redlining knowing that they could avail themselves to GO Act funding to correct this issue. Redlining is counterproductive to the goal of the GO Act. This issue can be resolved by limiting the subsidies to the deployment of new construction and technology.
- The FCC should expand the list of companies that can be classified as “eligible tax payers.” Currently, the GO Act restricts eligible tax payers to carriers.⁴¹ The Gigabit

³⁷ S. 1013, 115th Cong. §2 Sec. 1400z-2 7 (“GO Act”) (2017).

³⁸ GO Act Sec. 1400z-1 at. 2-3.

³⁹ GO Act Sec. 1400z-1 at 7.

⁴⁰ *A Digital Empowerment Agenda*, *supra* at 4 ¶7.

⁴¹ GO Act 1400z-2 at 10 line 18 – 12 line 2.

Opportunity Zone concept is modeled after Jack Kemp's Enterprise Zone legislation.⁴² In his bill, Kemp proposed tax incentives for business in the zone to hire employees from the zone.⁴³ This encouraged the buildup of the community by the community. Restricting tax incentives to only carriers would be inconsistent with Kemp's vision.⁴⁴

As applied to today's telecommunications world, Kemp's vision would contemplate incentives for local small businesses such as those engaged in laying fiber, installing cells and towers, operating customer service all centers, manufacturing hardware and software, and providing local consumer education, training, and youth development through broadband. Chairman Pai shares Jack Kemp's original vision⁴⁵ and it is important that the GO Act models that common goal.

- To protect the integrity of the GO Act, the FCC and NTIA should be encouraged rather than discouraged from collecting data.⁴⁶ The bill is ground breaking legislation and thus it is important to ensure funds are being wisely expended. A program cannot be properly evaluated without a full understanding of its operation. It has been difficult to determine the effects of enterprise zones in the past because of a lack of data collected.⁴⁷ We agree

⁴² Jack Kemp was Secretary of Housing and Urban Development (HUD) under George H.W. Bush. Kemp was one of the creators of the first enterprise zones and helped create the H.R.3824 Urban Jobs and Enterprise Zone Acts of 1981, H.R.3824, 97th Cong. (1981-1982), available at <https://www.congress.gov/bill/97th-congress/house-bill/3824> (last visited August 28, 2017).

⁴³ *Id.*

⁴⁴ Kemp did not believe that the incentives were designed for the Fortune 500 companies alone because "The net creator of jobs in the United States of America [were] Mom and Pop, small business men and women... the guy or gal that leaves the big company and goes out and starts their own company." See Jack Kemp speaking to the House Banking Subcmte. on Economic Stabilization (March 22, 1989), available at <https://www.c-span.org/video/?6794-1/enterprise-zones> (last visited August 31, 2017).

⁴⁵ Jack Kemp wanted to "put a face on the entrepreneurial system" because he believed in the "tremendous entrepreneurial talent waiting to be tapped in the nations inner cities" See Jack Kemp speaking to the Senate Small Business Committee about Enterprise Zones (July 22, 1991), available at <https://www.c-span.org/video/?19572-1/enterprise-zones> (last visited August 28, 2017).

⁴⁶ It states "Nothing in this Act or the amendments made by this Act shall be construed to provide additional authority for the collection of data to the Federal Communications Commission or to the National Telecommunications and Information Administration." GO Act Sec. 1400z-3 Sec. 4 at 23 line 12-15.

⁴⁷ U.S. Gov't Accountability Office, GAO-06-727, Congressional Committees: Empowerment Zone and Enterprise Community Program 4-5 (2006).

with Commissioner O’Rielly that “adopting rules without any estimate of the impact is the height of arbitrary decision-making.”⁴⁸ The FCC cannot properly measure the cost to benefit ratio of this proposal if data is not collected. The reporting does not need to be invasive or burdensome. However, it is necessary to protect taxpayers, to ensure the integrity of the program, and to and to facilitate the cost-benefit analysis that the FCC requires or should require.

- Lastly, the bill should have language that requires outreach broad enough to reach qualified minority and women-owned business enterprises, disabled and veteran owned firms, and stating that Congress encourages their participation in the program. The language could be modeled after the race- and gender-neutral language in Section 634(d)(2)(E) of the Cable Communications Policy Act of 1984 and implemented by 47 C.F.R. §76.75(e)(1).⁴⁹

Respectfully submitted,⁵⁰

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⁴⁸ See Commissioner Michael O’Rielly speaking at the Research Conference on Communications, Information, and Internet Policy, 3 (September 30, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-341544A1.pdf (last visited September 3, 2017).

⁴⁹ The rule states that the Commission should “[e]ncourage minority and female entrepreneurs to conduct business with all parts of its operation. For example, this requirement may be met by: (1) Recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests.”

⁵⁰ MMTC recognizes and appreciates the research assistance of its Earle K. Moore Fellow, Matthew Sneed, of the Syracuse University College of Law.